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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ABRO MANAGEMENT CORP.,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

INDEX NO. 113176/10

MOTION DATE 06-22-11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... UNFILED JUDGMENT

Answering Affidavits — Exhibits _____ cross motion

Replying Affidavits 2, 3, 4

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered and adjudged that this Article 78 petition is denied and the proceeding is dismissed.

In this Article 78 proceeding, petitioner, Abro Management Corp., seeks a judgment annulling respondent's New York State Division of Housing and Community Renewal (DHCR) determination that Zoe and Ross Fedeles (the "Tenants"), residing at 481 Fort Washington Avenue, New York, New York apartments (the "Premises"), are entitled to treble damages on their rent overcharge complaint against Petitioner. In the event Petitioner prevails, it also seeks an award of actual attorney's fees and expenses incurred in connection with this proceeding.

An administrative proceeding was commenced when the Tenants filed a rent overcharge complaint with the DHCR on October 7, 2008 (the "Complaint"). Tenants complained of rent overcharges arising from the fact that the rent they were paying was nearly double what the previous tenant had been paying and that part of the rent increase had been based on improvements to the apartment which the Tenants claimed were never performed. The Tenants included the apartment's rent history as well as photographs of the Premises from before and after they moved in.

The Complaint was forwarded to the Petitioner by the DHCR on October 14, 2008 (the "Notice"). The Notice gave the Petitioner thirty (30) days to respond to the Complaint. The Petitioner did not request an extension of time in which to file an answer from the DHCR and did not submit an answer to the Notice within the 30 day deadline.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

On January 8, 2009 the DHCR received the Petitioner's answer to the Notice. The Petitioner admitted overcharging the Tenants by $9,693.48 plus 9% interest of $872.41 for a total overcharge of $10,565.89. The Petitioner's calculation of the rent overcharge included, among other factors, a rent increase of $104.43 based on $4,177.20 worth of improvements the Petitioner claimed to have made to the Premises before the Tenants moved in. The Petitioner issued the Tenants a refund check for $10,565.89 and adjusted the Tenants' monthly rent to $886.49.

On January 14, 2009, the DHCR received the Tenants' reply. The Tenants acknowledged the Petitioner's offer, but rejected the offer and elected to continue the process of the overcharge complaint. The Tenants disputed the Petitioner's calculation of the overcharge, arguing that the improvements claimed by the Petitioner were in fact necessary repairs, not improvements.

On August 20, 2009, the DHCR sent the Petitioner a "Final Notice to Owner-Imposition of Treble Damages" (the "Final Notice"). The Final Notice notified the Petitioner that the DHCR proposed a finding of a rent overcharge in the amount of $30,001.94, which included treble damages equaling three times the amount of the rent overcharge. The Final Notice informed the Petitioner that the DHCR had denied Petitioner's claimed improvements of $1,100 because those items were repairs and/or standard maintenance and could not be considered improvements. The Final Notice also informed the Petitioner that they were charging and collecting more than what was allowed under the Guideline Board Orders. The Final Notice gave the Petitioner twenty-one (21) days to submit an answer to show that there was no overcharge and/or that any overcharge was not willful.

On December 7, 2009, the DHCR received the Petitioner's response to the Final Notice. In the response, the Petitioner admitted the rent overcharge, but claimed that it had refunded in good faith the excess rent collected and that treble damages were not warranted where an owner adjusts the rent and repays the amount of the rent overcharge within the time afforded to interpose an answer to the Notice.

On January 15, 2010, the DHCR's Rent Administrator issued an order finding a rent overcharge and that the Petitioner had not established that the rent overcharge was not willful. The DHCR's Rent Administrator found that the Tenants were due $31,066.95 which included treble damages.

After some administrative difficulties, on July 2, 2010, the Petitioner filed an administrative appeal, a Petition for Administrative Review (PAR), challenging the imposition of treble damages. The Petitioner argued that it had acted in good faith in tendering refunds after both notices by the DHCR and that this rebutted the presumption of willfulness of the overcharge based on prior DHCR orders, case law, and more specifically, the DHCR's Policy Statement 89-2. The DHCR's Policy Statement 89-2 was issued to clarify the DHCR's position on the application of treble damages. It states that,

> [the] DHCR has determined that the burden of proof in establishing lack of willfulness shall be deemed to have been met and, therefore, the treble damage penalty is not applicable,...[w]here an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the proceeding and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest.

On August 13, 2010, the DHCR's Rent Administrator issued an Order and Opinion denying the Petitioner's PAR. The DHCR's Rent Administrator found that the refund offered by Petitioner did not meet the standard of DHCR Policy Statement 89-2. A footnote to the Order and Opinion explained that,

> [t]he amount proffered in response to the [Notice] was insufficient, largely because the [Petitioner] had included, in the cost of improvements made while the [Premises] were vacant, items that it should have known constituted mere repair or maintenance. Moreover, *even if credit were allowed for all the improvements claimed*, the refund and rental reduction made in response to the complaint still left overcharges (of $289.84 per month under the [T]enant[s'] first lease and $30.76 under the current one).

Thereafter, the Petitioner filed this Article 78 petition challenging the DHCR's imposition of treble damages.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); *Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 551 N.E.2d 72, 551 N.Y.S.2d 871 (1989). Judicial review of an administrative determination under Article 78 is confined to the facts and record adduced before the agency. *See Featherstone v. Franco*, 95 N.Y.2d 550, 742 N.E.2d 607, 720 N.Y.S.2d 93 (2000); *Matter of Rizzo v. New York State Div. Of Hous. and Community Renewal*, 6 N.Y.3d 104, 843 N.E.2d 739, 810 N.Y.S.2d 112 (2005). An agency is to be accorded wide deference in the interpretation of its regulations and governing statutory law, however, it cannot engraft requirements or assume powers not found in the enabling legislation. *See Vink v. New York State Div. Of Hous. and Community Renewal*, 285 A.D.2d 203, 729 N.Y.S.2d 697 (N.Y.A.D. 1st Dept., 2001).

The DHCR Rent Administrator's determination was supported by substantial evidence because Rent Stabilization Law Section 26-516(a) and Rent Stabilization Code Section 2526.1 mandate that the DHCR impose treble damages

on a finding of rent overcharge unless the owner establishes by a preponderance of the evidence that the rent overcharge was not willful. The burden is upon the Petitioner to rebut the presumption of willfulness. *See Yorkroad Associates v. DHCR*, 19 A.D.3d 217, 797 N.Y.S.2d 60 (N.Y.A.D. 1st Dept., 2005); *425 3rd Avenue Realty Co. v. DHCR*, 29 A.D.3d 332, 816 N.Y.S.2d 411 (N.Y.A.D. 1st Dept., 2006).

This Court finds that there was a rational basis for the DHCR Rent Administrator's decision. The overcharge refund offered to the Tenants after the Final Notice does not meet the requirement that such an offer be made within the time afforded to interpose an answer to the Notice. It would be inconsistent to allow owners to argue that the rent charged was proper in their response to the Notice, and then to make a refund offer after the DHCR determines that there was an overcharge and claim that the overcharge was not willful. When owners receive the Notice, they must make a decision to concede the overcharge alleged in the complaint and make a full refund or to stand by their calculation of rent and dispute the complaint.

This Court also finds that there was a rational basis for the DHCR Rent Administrator's decision that the overcharge refund offered to the Tenants on or about January 8, 2009 did not meet the standard of Policy Statement 89-2. The burden is on the Petitioner to submit evidence rebutting the presumption of willfulness. The standard explained by Policy Statement 89-2 requires the owner to tender, in good faith, a full refund of all excess rent collected. It is hard to argue that the Petitioner's efforts were made in good faith when the answer to the Notice and accompanying refund offer, which was required within 30 days, was submitted after three months, and the answer to the Final Notice and accompanying refund offer, which was required within 21 days, was submitted after three and a half months. The lateness of the Petitioner's actions were not made central to the DHCR Rent Administrator's decision so this Court need not consider whether this, on its own, was a sufficient basis for a finding that the Petitioner had not met the good faith standard of Policy Statement 89-2.

The central issue of the DHCR Rent Administrator's decision was that the refund offer was not a full refund offer because it did not include the improvements claimed by the Petitioner as part of the rent increase and the charging and collecting of more than what is allowed under the Guideline Board Orders. To rebut the presumption of willfulness on the claimed improvements, the Petitioner submitted an invoice with little detail and to rebut the presumption of willfulness for the Guideline Board Orders overcharge, the Petitioner offered no evidence.

The invoice submitted by the Petitioner does not go into much detail explaining the work performed, but what little detail there is does not support the Petitioner's claims. The work description in the invoice includes language such as, "[r]eplace molding where needed; [s]heetrock ceilings where needed; [p]aint and plaster [which was later claimed to be worth $100]; [s]ome plumbing [later claimed to be worth $750]."

A real estate management company such as Petitioner, should know that some repairs are a necessary precondition to re-leasing their apartments and that there is no basis for claiming that these are improvements. Beyond that, the plain language of the invoice contradicts the Petitioner's claims. The inclusion of the "where needed" language clearly demonstrates that these were necessary repairs and not improvements. Common sense would also suggest that the $100 charged for painting, which presumably included the cost of the paint, and the $750 charged for plumbing, which also presumably included materials, are fees more consistent with repairs than with improvements. The before and after photos submitted by the Tenants also demonstrate the patchwork nature of the work done.

On the issue of collecting more than allowed under the Guideline Board Orders, the Petitioner submitted no evidence to rebut the presumption of wilfulness. This Court therefore finds that there was a rational basis for the DHCR Rent Administrator's decision given the standard that the overcharge must be deemed willful where the owner submits no evidence or where the evidence is equally balanced.

The Petitioner argues that the DHCR Rent Administrator's decision was arbitrary and capricious because it is contrary to established DHCR precedent and established case law. The cases cited by Petitioner involve situations in which the imposition of treble damages was annulled because the owner had offered a full refund to the tenant within the time allowed, and such refund had been ignored by the DHCR. The instant case can be distinguished from the cases cited by Petitioner by the fact that the DHCR did consider the rent overcharge refund offer made by the Petitioner, and clearly stated that the offer did not meet the standard of a full refund. The footnote in the denial of the Petitioner's PAR specifically states why the offer was insufficient. Petitioner argues that the offer was made in good faith because Petitioner believed that the offer was reasonable.

Policy Statement 89-2 does not require a reasonable refund offer, but rather a full refund offer of all excess rent collected, plus interest. Given the facts: that the overcharge refund was made three months after the Petitioner received the complaint, that the Petitioner should have known that the work done to the Premises, which Petitioner's own invoice described as necessary, could not be considered improvements, that even putting aside that the Petitioner should have known, Petitioner made no attempt to seek the advice of the DHCR on the so-called improvements Petitioner knew were part of Tenant's overcharge complaint, and that even allowing the repairs to be considered improvements the Petitioner's refund offer still overcharged the Tenants' rent, this Court cannot find the DHCR Rent Administrator's decision, that the Petitioner's refund offer did not meet the standard to rebut the presumption of willfulness, as arbitrary and capricious.

Petitioner also argues that the DHCR Rent Administrator's decision is arbitrary and capricious because Policy Statement 89-2 contradicts the language of the DHCR's Final Notice of Imposition of Treble Damages. Specifically, Petitioner argues that Policy Statement 89-2's requirement that to rebut the presumption of willfulness a full refund must be made within the time afforded to interpose an answer to the proceeding contradicts the language in the Final Notice that affords an owner the opportunity to submit proof that an overcharge was not willful. Petitioner's argument confuses the deadline imposed in which to make an overcharge refund offer with the deadline in which to submit proof to establish that such an offer had already been made.

Accordingly, it is the decision and order of this court that the petition is denied and the proceeding is dismissed.

Accordingly, it is ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of this court.

Dated: August 3, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE